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In the Supreme Court

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OCTOBER TERM, 1941

No. 61

HARRY F. MEILINK, as Trustee in Bankruptcy of the Estate of United Lamp & Shade Corp. (a corporation), Bankrupt,

Petitioner,

vs.

UNEMPLOYMENT RESERVES COMMISSION OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

OPINION BELOW.

The opinion of the Ninth Circuit Court of Appeals (R. 32-44) is reported in 116 F. (2d) 330.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered December 12, 1940. (R. 44-45.) The petition for a writ of certiorari was filed April 28, 1941 and was granted October 6, 1941. The jurisdiction of this Court is invoked under Section 240, as amended, of the Judicial Code, 28 U. S. C. A. 347.

QUESTION PRESENTED.

Is so much of the interest at the rate of 12% per annum, exacted by the Unemployment Reserves Commission of the State of California pursuant to Section 45 of the Unemployment Reserves Act of California, which is 5% in excess of the legal rate of interest of the State of California of 7% per annum, and which excess rate is included in the proof of claim of the Unemployment Reserves Commission of the State of California, a penalty in bankruptcy rather than interest within the purview of Section 57j of the Bankruptcy Act?

STATUTES INVOLVED.

Section 45 of the Unemployment Reserves Act (Chapt. 352, 1935 Statutes of California, p. 1226), during the period the contributions and interest claimed by the respondent accrued, read as follows:

> "If any employer defaults in any payment required of him, for himself or on behalf of employees under this act, he shall become *addition-*

> *ally liable* for interest on such payments at the rate of twelve per cent per annum from the date such payment becomes due, both principal and interest being payable in the same manner as the contributions. Such payment and interest shall be collectible in the name of the fund in any manner practicable, including civil action by the commission against the defaulting employer." (Italics ours.)

Section 57j of the Bankruptcy Act (Title 11 U. S. C. A. Sec. 93j) during the period the contributions and interest claimed by the respondent accrued, read as follows:

> "Debts owing to the United States, a state, a county, a district, or a municipality as a *penalty* or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law." (Italics ours.)

Section 64a (4) of the Bankruptcy Act (Title 11 U.S.C.A. Sec. 104) reads as follows:

> "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be
>
> * * * * * * *
>
> "(4) Taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: *Provided*, That no order

shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court; *And provided further,* That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court."

The Constitution of the State of California, Article XX, Section 22, during the period the contributions and interest claimed by respondent accrued, read as follows:

"The rate of interest upon the loan or forbearance of any money, goods or things in action, or on accounts after demand or judgment rendered in any court of the State, shall be seven per cent per annum but it shall be competent for the parties to any loan or forbearance of any money, goods or things in action to contract in writing for a rate of interest not exceeding ten per cent per annum. * * *"

STATEMENT.

In the bankruptcy proceeding of United Lamp & Shade Corp., a corporation, a proof of claim (R. 6) was filed by the Unemployment Reserves Commission of the State of California for employer and employee contributions, demanding interest thereon at the rate of 12% per annum. The Trustee in Bankruptcy paid the principal sum of said proof of claim with interest thereon at the rate of 6% per annum and filed an objection (R. 7) to the 12% per annum interest de-

manded, upon the ground that the difference between the 6% per annum interest paid by him and the 12% per annum interest demanded constituted a penalty within the purview of Section 57j of the Bankruptcy Act. (Title 11, U. S. C. A. Sec. 93j.) The objection of the Trustee to the payment of the penalty came on for hearing before the Referee in Bankruptcy and the objection to the payment of a penalty was sustained, the Referee in Bankruptcy (R. 9) directing the payment of interest at the rate of 7% per annum on the proof of claim upon the ground that said percentage was the legal rate of interest in the State of California.

The Unemployment Reserves Commission of the State of California filed a petition to review the order of the Referee in Bankruptcy (R. 15), and his certificate and report (R. 18) and his order came on for hearing before the United States District Court for the Northern District of California, Southern Division, and an order (R. 24) was duly made and entered by the District Judge approving and confirming the certificate and report and the order of the Referee in Bankruptcy. An appeal (R. 28) was taken from the order of the District Court to the Ninth Circuit Court of Appeals and on the 12th day of December, 1940 its order (R. 31) was duly made and entered reversing the order of the District Court for the Northern District of California, with instructions to approve the proof of claim with interest thereon at the rate of 12% per annum.

SPECIFICATION OF ERROR TO BE URGED.

The Circuit Court of Appeals erred:

In ordering so-called 12% per annum interest paid by the Trustee in Bankruptcy to the Unemployment Reserves Commission of the State of California on its proof of claim for unpaid contributions and by doing so thereby directed payment of a penalty of 5% in excess of the legal rate of 7% per annum interest in the State of California, contrary to the provisions of Section 57j of the Bankruptcy Act.

SUMMARY OF ARGUMENT.

Section 45 (R. 2-3 and R. 33) of the California Unemployment Reserves Act providing that an employer who defaults in any payment required of him under the Act shall become additionally liable for interest on such payment at the rate of 12% per annum from the date such payment becomes due, imposes a penalty on a defaulting employer to the extent that the "interest", so-called, exceeds the pecuniary loss resulting from the failure of the employer to pay his contributions when due.

To the extent which such "interest" charge exceeds the pecuniary loss, it is a penalty which, under the provisions of Section 57-j of the Bankruptcy Act, is not provable in a bankruptcy proceeding. The nature of the charge cannot be changed by designating it as interest rather than a penalty. The respondent produced no proof as to its actual pecuniary loss. The general rate of interest in California is 7% per an-

num, unless a rate not to exceed 10% is established by agreement between the parties. There being no proof that the respondent suffered any extraordinary loss as the result of the failure of the bankrupt to promptly pay its assessment, the Circuit Court erred in holding that interest at 12% per annum was not unreasonable.

The Courts have consistently held that interest on delinquent tax payments due to a state, or any subdivision thereof, will not be allowed in a bankruptcy proceeding in excess of the general rate of interest permitted by the applicable state law which, in this case, was 7% per annum. This Court so held in *New York v. Jersawit*, 263 U. S. 493, and said decision is in accordance with the majority of the opinions of the Circuit Courts of Appeals and the District Courts.

The decision of this Court in *U. S. v. Childs*, 266 U. S. 304, is clearly distinguishable in that the statute there interpreted was a federal statute, and the decision therein was based largely upon the necessity for uniformity of interpretation of a federal statute throughout the United States. No reported decision, other than that of the Ninth Circuit Court of Appeals in this proceeding, has applied the reasoning of the *Childs* decision to a state statute.

Federal and other taxing authorities within the State of California exact only 6% per annum interest on claims in bankruptcy, and the Attorney General of California has himself characterized the interest provisions of Section 45 of the California Unemployment Reserves Act as a penalty.

ARGUMENT.

I.

ALLOWANCE OF INTEREST IN EXCESS OF 7% PER ANNUM WOULD PERMIT RESPONDENT TO SHARE IN THE BANKRUPT'S ESTATE TO AN EXTENT NOT REPRESENTED BY A PECUNIARY LOSS.

The ultimate aim of the bankruptcy law is equality between creditors, and to obtain it this Court has held that regard must be had to "the essential nature of transactions and not to their form or accidents". *Clarke v. Rogers*, 228 U. S. 534, 548.

To ensure distribution to creditors on the basis of their actual pecuniary losses resulting from the insolvency of the debtor, the Bankruptcy Act provides, in Section 57-j:

> "Debts owing to the United States or any State or subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

The effect of this section was stated by the Circuit Court of Appeals for the Second Circuit in *In re Abramson*, 210 Fed. 878, at page 880, as follows:

> "The law maker who has suffered no pecuniary loss is not permitted to share in the assets of the estate with the creditors who have."

In *In re Caponigri*, 193 Fed. 291 (D.C.N.Y.), Judge Learned Hand said, at page 293:

> "The result would be unjust, because the words of the statute so plainly show the purpose of Congress not to exercise its sovereign right to a preference, except as the United States treasury has suffered. Nothing could be plainer. It would be unjust to thwart so plain a purpose through at best only verbal ambiguity."

Respondent produced no proof whatsoever that interest at the rate of 12% upon its claim is the measure of its actual pecuniary loss, but it relies upon the provisions of Section 45 of the California Unemployment Reserves Act which designates its claim as "interest", and contends that, merely because it is so designated, it must be deemed interest and allowed as such.

Interest on debts is defined in Bouvier's Law Dictionary as follows:

> "The compensation which is paid by the borrower of money to the lender for its use, and, generally, by a debtor to his creditor for recompense for his detention of the debt."

In so far as the interest provided for in Section 45 of the Unemployment Reserves Act exceeds the rate which will fairly compensate it for the loss sustained, it should be held to be a penalty.

In *In re Caponigri* (supra), Judge Learned Hand defined a penalty as follows (p. 292):

> "In substance, an obligation is penal when its amount is measured neither by the obligee's loss nor by the valuation placed by him upon what he is given in exchange."

In *In re Ashland, Emery & Corundum Co.*, 229 Fed. 829, the Court defined a penalty as follows (p. 831):

> "A penalty, as applied to cases of this character, means a punishment imposed for failure to make the payment on time."

The question to be determined, then, is: Is 12% per annum fairly required to make good the loss to the respondent for mere delay in payment of the tax?

While the legislature of California has wide powers in fixing interest rates on delinquent tax payments, merely calling the charge "interest" will not, and cannot, change its character if it be in fact a penalty.

In *U. S. v. LaFranca*, 282 U. S. 568, this Court said (p. 572):

> "no mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such."

Under the provisions of Section 64-a(4) of the Bankruptcy Act, any question arising as to the amount or legality of any taxes is to be heard and determined by the court of bankruptcy. It is the duty of the bankruptcy court to determine whether a claim for so-called interest on delinquent taxes, whether imposed by the federal government, or by any state or subdivision thereof, represents fair compensation for the loss of the use of money, or whether it is in fact a penalty imposed as a punishment for failure to pay.

In *In re J. Menist & Co.*, 290 Fed. 947 (C.C.A. 2nd Cir., reversed on other grounds, 266 U. S. 304), the Court said per Hough, J. (p. 949):

> "Since in bankruptcy (and we are solely concerned with bankruptcy) the power of ascertaining the amount or legality of any tax is vested in the court (section 64 a), and penalties are not to be allowed, except for the amount of pecuniary loss sustained by the delayed payment, the only question here is whether an exaction of 1% a month as the price of delay amounts to a penalty. * * * On the point at bar we are in accord with *In re Ashland, etc. Co.* (D.C.) 229 Fed. 829, which held, that there being no evidence of any injury or damage to the government by the withholding of this tax, except that which flows from the nonpayment of a just debt, anything in excess of the legal rate of interest is to be treated as a penalty and not allowed."

In *In re Denver & R. G. W. R. Co.*, 27 F. Supp. 983 (D.C.Colo.), the Court, refusing to allow interest on delinquent taxes at the rate of 2% a month, said (p. 94):

> "It is important to note that Section 57-j in addition to the debt, allows only the pecuniary loss sustained by the state as a result of the failure to pay the tax on time, plus such interest as may have accrued according to law. Legal interest in Colorado is 6%. No showing of any loss sustained by the state is made, other than interest from the date payment was due. Money, especially in these days, is not worth 2% a month and the money would not have drawn 2% a year had it been on deposit in a bank."

In *In re Ashland Emery & Corundum Co.*, 229 Fed. 829 (D.C. Mass.), the Court, refusing to allow 1% a month on delinquent tax claims, said (p. 832):

> "1 percent a month exceeds what is fairly required to make good loss to the state for mere delay in payment of the tax, and as to such excess is not interest, but constitutes a penalty imposed for failure to pay promptly. * * * What the state lost was the use of money. Its damages therefor are the commonest form known to law and the most certain of estimation. They are established by statute in New Jersey for individuals at 6 percent per annum. * * * It is difficult to see how, as damages, they can be larger in the case of the state."

Throughout these decisions the fundamental thought is that under Section 57-j it would be inequitable for the Court, in the exercise of the duty imposed upon it by Section 64-a, to permit the state to share in a bankrupt's estate to an extent which does not represent an actual pecuniary loss; and when the only loss suffered by the state is occasioned by mere delay in the payment of the tax, interest will not be permitted in excess of the general rate permitted by law, unless a greater pecuniary loss is shown.

This Court will not shut its eyes to the fact that draftsmen of tax statutes often refrain from using the word "penalty" in connection with the sanction imposed for the non-payment of a tax, well knowing that otherwise, in case of bankruptcy, the claim will be exposed to disallowance.

The importance of careful scrutiny of such sanctions lies in the fact that, were the phraseology used by the taxing authority controlling, the measure of its participation in a bankrupt estate would be limited only by what it saw fit to exact. Taxes being entitled to priority under Section 64a of the Bankruptcy Act, general creditors might well be mulcted of the entire estate by the establishment of arbitrary interest rates on delinquent tax claims.

If a statute should provide for interest on delinquent taxes at the rate of 48% per annum, it would be obvious that such a rate would represent a penalty rather than mere reimbursement for pecuniary loss. The dividing line between true interest and a penalty is susceptible of demarcation only if the rule of pecuniary loss be strictly applied. The application of such a rule would seem to require that any rate in excess of the general rate established by the state, or other governmental body, as compensation for loss of the use of money, should be controlling in the absence of affirmative proof on the part of the taxing authority that the loss sustained was greater than that rate.

In California, the general rate of interest is 7%, except that a rate not to exceed 10% may be established by agreement between the parties. Small loan companies, and other similar businesses, are allowed a greater rate of interest, but it may be presumed that such greater rate was established by the legislature upon a showing that the necessities of that type of business require a higher rate in view of the risks assumed and the expense of servicing small loans.

The reasons justifying a higher rate on such loans, however, are not applicable to claims for taxes, especially in view of the priority afforded to tax claims by the provisions of Section 64a of the Bankruptcy Act.

We submit, therefore, that there being no proof in this case that the Unemployment Reserves Commission of California suffered any extraordinary loss as a result of the failure of the bankrupt to promptly pay its assessment, the Circuit Court erred in holding that interest at 12% was not *per se* unreasonable. The burden of proving a loss greater than that represented by the general rate established by the Constitution of California, to wit, 7%, should have been imposed upon the respondent.

II.

THE COURTS HAVE CONSISTENTLY HELD THAT INTEREST ON DELINQUENT TAX PAYMENTS DUE TO A STATE OR ANY SUBDIVISION THEREOF WILL NOT BE ALLOWED IN A BANKRUPTCY PROCEEDING IN EXCESS OF THE GENERAL RATE OF INTEREST PERMITTED BY THE APPLICABLE STATE LAW.

In *New York v. Jersawit*, 263 U. S. 493, the facts disclose that the State of New York was demanding payment in a bankruptcy proceeding of a 10% penalty as well as 12% per annum interest. This Court disallowed the 10% penalty, and finding that 1% a month was more than the value of the use of money, affirmed the decision of the Second Circuit Court of Appeals allowing only 6% per annum interest on the

state's claim. Although this Court considered the penalty and interest as part of one corpus because of the phraseology of the statute, it nevertheless held that 12% per annum interest was excessive and not allowable in a bankruptcy proceeding. Your petitioner respectfully submits that owing to the factual similarity between the *Jersawit* case and the pending matter, the order of the District Court in this proceeding should have been affirmed.

In *In re Pressed Steel Car Co. of New Jersey*, 100 F. (2d) 147, the Third Circuit Court, on the authority of the *Jersawit* case, found that 1% per month interest prescribed by a statute of the State of New Jersey was a penalty and could not be allowed in a bankruptcy proceeding. Allowing only simple interest, the Court said, at page 153:

> *"We think that there is no doubt that the interest rate of 1% per month for each month that the tax remains unpaid proposed to be levied by the statute* * * * is a *penalty* (New York v. Jersawit, 263 U. S. 493, 496, 44 S. Ct. 167, 68 L. Ed. 405). *In the case at bar we presume that the State of New Jersey will not object to receiving simple interest and if this be so, such interest should be allowed on the claims.* (Italics ours.)

In *In re Denver & R. G. W. R. Co.* (D. C. Colo.), 27 F. Supp. 983, wherein interest was claimed at 2% per month and was allowed at 6% per annum, a pertinent discussion by the Court of penalty phraseology used in the statutes and the necessity of any loss sustained by the State being shown, is found at page 984:

"Unfortunately the terms penalties, forfeitures, interest are too often used interchangeably to permit decision solely on the choice of terms made by the draftsman of the Act. 25 C. J. 1178, describes a penalty as a sum of money which the law exacts by way of punishment for doing something that is prohibited or omitting something that is required to be done. That it involves the idea of punishment, either corporal or pecuniary. Elsewhere the same authority, 61 C. J. 1616, sec. 2220, states interest charged on a delinquent tax by statute is not regarded as interest in the sense that it is a consideration for the forbearance of money, but is deemed to be a penalty, and is not a part of the tax, but pertains to the remedy employed to compel payment. * * *

"It is important to note that sec. 57-j, in addition to the debt, allows only the pecuniary loss sustained by the state as a result of the failure to pay the tax on time, plus such interest as may have accrued according to law. Legal interest in Colorado is 6%. No showing of any loss sustained by the state is made, other than interest from the date payment was due. Money, especially in these days, is not worth 2% a month and the money would not have drawn 2% a year had it been on deposit in a Bank. See also In re 168 Adams Building Corporation, D. C., 27 F. Supp. 247. We think the intent of the legislature as manifested by this provision was to force payment of the tax when due.

"The petition is denied."

A similar discussion is also found in *In re Ashland Emery and Corundum Co.* (D. C. Mass.) 229 F. 829,

where the Court, holding that only 6% was allowable on a bankruptcy proof of claim of the State, said at page 832:

> "Assuming, however, that it is, it seems to me plain, and I accordingly find, that 1 per cent a month exceeds what is fairly required to make good loss to the state from mere delay in payment of the tax, and as to such excess is not interest, but constitutes a penalty imposed for failure to pay promptly. The actual damages sustained by the state of New Jersey from the delay are not obscure nor difficult to estimate. What the state lost was the use of the money. Its damages therefor are the commonest form known to the law, and the most certain of estimation. They are established by statute in New Jersey for individuals at 6 per cent per annum. Gen. Stats. of N. J. p. 3704. It is difficult to see how, as damages, they can be larger in the case of the state. * * *
>
> "The sum here claimed is double the statutory interest and almost double the highest rate of interest which national banks are allowed to charge under United States statutes. * * *
>
> "The order of the referee disallowing the claim is reversed; the claim is allowed for interest at 6 per cent on the face of the tax from July 1, 1914, when the tax became due, to April 1, 1915, when it was paid, the amount thereof being $59.22; the balance of the claim is disallowed."

In *In re 168 Adams Building Corporation* (D. C. Ill.), 27 F. Supp. 247 (aff'd. 105 F. (2d) 704 (C. C. A. 7th); cert. denied 308 U. S. 623), interest on a bank-

ruptcy tax claim fixed by a County Tax Collector of Illinois was only allowed at 5%, and at page 249 Circuit Judge Evans of the Seventh Circuit Court of Appeals, sitting as District Judge, said:

> "As to interest, penalties, costs, etc., which have accrued and which I am informed are large, they should be reduced to five per cent interest upon all unpaid taxes from the date their payment was lawfully and properly demanded.
>
> "This ruling is on the ground that complainant has come into this court for the allowance, protection, and enforcement of its claim. The legal rate of interest in Illinois is five per cent."

So also in *In re A. E. Fountain, Inc.* (D. C. N. Y.), 295 . . 873, and in *In re Wells* (D. C. Md.), 4 F. Supp. 329, simple interest only was allowed on tax claims in bankruptcy proceedings.

Neither in *Beardsley & Wolcott Mfg. Co.* (2 C. C. A.), 82 F. (2d) 239 (R. 39), nor in *Horn v. Boone Co.* (8 C. C. A.), 44 F. (2d) 920, cited by the Court below, was interest allowed at a rate in excess of that allowed by agreement under the State statute. In the former case, the Court allowed interest at 9% per annum which was below the statutory limit of 12% allowed by the Connecticut statute. In the latter case, the interest exacted was found to be no greater than interest allowed by agreement under a Nebraska statute providing for two legal rates of interest, to wit, 7% on ordinary debts and not to exceed 10% by agreement of the parties.

In the pending matter, the allowance of 12% per annum interest is *two* per cent in excess of the rate allowed by the provisions of Section 22, Article XX, of the California Constitution, providing for interest at 7% per annum and by agreement of the parties not to exceed *10%* per annum, excepting from these restrictions, however, certain specified lending agencies hereinabove referred to.

The Circuit Court, in its opinion in the instant case, cited the *Martin* case (7 C. C. A.), 75 F. (2d) 618 (R. 40), but in that decision, as the opinion of the Circuit Court herein clearly shows, the penalty provisions of Section 57-j of the Bankruptcy Act were not involved, and the Court there did not consider or rule upon the question of whether the interest might be so excessive as to constitute a penalty. It appears that this contention was not presented for the determination of the Seventh Circuit Court of Appeals in the *Martin* case.

U. S. v. Childs, 266 U. S. 304, is clearly distinguishable in that the statute there involved was a *federal* statute, and the reasoning which led the Court to hold as it did is not applicable in a case arising under a state statute. It is interesting to note that of all the cases decided since the *Childs* case, the Court below, in the instant case, was the first to apply the reasoning of the *Childs* case to a state statute.

In the *Childs* case, the question was the construction of a 1916 Federal Income Tax Statute providing for the payment of a penalty as well as 12% per annum interest. This Court held that the statute was

precise and the penalty and interest provisions were clearly distinguished one from the other. It was unable to find that the word "interest" was used for a cloak for a penalty, but stated in its opinion that the use of the word "interest" would not save it from condemnation if it were, in fact, a penalty. The *Childs* case is distinguishable from the instant case in that the statute was a federal enactment and uniformity of operation in all of the states was a necessary concomitant. Otherwise a different rate of interest would apply in every state or locality depending upon the value of money then prevalent within the jurisdiction where the question arose. At page 301 this Court said:

> "It makes the rate of interest that of a particular locality, differing with the locality, * * *; *and abridges or controls a Federal statute by a local law or custom, and takes from it uniformity of operation.*" (Italics ours.)

The reasons advanced by this Court in the *Childs* case in support of the allowance of interest at 12% per annum have no application to the 12% per annum so-called "interest" involved in the pending matter. Uniformity of interpretation is not here a problem inasmuch as a state and not a federal statute is involved.

Due to the factual difference found in the *Childs* case, your petitioner respectfully submits that the Circuit Court erred in basing its decision in the pending matter thereon and should have affirmed the order of the District Court (R. 24) by following the decision of this Court in *New York v. Jersawit*, 263 U. S. 493.

III.

FEDERAL AND OTHER CALIFORNIA STATE TAXING AUTHORITIES DEMAND ONLY SIX PER CENT PER ANNUM INTEREST ON BANKRUPTCY PROOFS OF CLAIM.

That respondent's claim to 12% exceeds what is fairly required to compensate for the loss of the use of money, is indicated by the interest claimed by other taxing agencies in California in bankruptcy proceedings. The Board of Equalization and the Franchise Tax Commissioner of the State of California only demand 6% per annum interest from trustees in bankruptcy, and the Collector of Internal Revenue makes a like interest demand for Social Security contributions,—which is less than the legal rate allowed by the California Constitution.

Your petitioner respectfully submits that the rate of interest demanded by other taxing agencies in bankruptcy proceedings is a fair amount to be charged for the forbearance of money and that respondent should not be entitled to a prior share in the bankruptcy proceeding in any sum in excess of the California rate of 7% per annum.

IV.

THE ATTORNEY GENERAL OF CALIFORNIA HAS HIMSELF CHARACTERIZED SECTION 45 OF CALIFORNIA UNEMPLOYMENT RESERVES ACT AS A PENALTY SECTION.

Your petitioner directed the attention of the Circuit Court to an opinion of the Attorney General of the State of California prepared for the executive officer of respondent. The Circuit Court (R. 44) commented

upon this opinion by stating that the attention of the Attorney General was not called to the provisions of Section 57-j of the Bankruptcy Act and hence the Circuit Court regarded the opinion as without significance. This opinion reads as follows:

"Earl Warren
Attorney General
State of California
Legal Department

San Francisco, April 27, 1939

Department of Employment
Carl L. Hyde, Executive Officer
1025 P Street
Sacramento, California

Attention: Mr. Maurice P. McCaffrey
Rules and Regulations Officer

Gentlemen:

"I have before me your communication of April 14, 1939, in which you submit the following questions for advice:

'Has the Unemployment Reserves Commission or the Department of Employment the authority under any circumstance to waive interest charges which have accrued under the provisions of the Unemployment Reserves Act and rules and regulations thereunder with respect to delinquent payments of contributions?'

"Section 45 of the Unemployment Reserves Act provides that if any employer fails to make payments required of him in accordance with the provisions of the Act and of the rules and regulations adopted by the Commission it shall become *additionally* liable for interest on such payments at the rate of 12% per annum from the date such payment becomes due. There is no statutory pro-

vision granting discretion to the Commission to waive the *interest penalty* provided for by the Act. *The Commission should make every effort to collect the interest penalty imposed* as well as the contributions due.

Very truly yours,
Earl Warren,
Attorney General,
By John J. Dailey,
Deputy.

Copy of Opinion No. NS1656

JJD/s
2824 RWH"

(Italics ours.)

Your petitioner calls the particular attention of the Court to the italicized language in the opinion wherein the Attorney General described 12% per annum as an *interest penalty* which the respondent cannot waive, and directs it to make every effort to collect the interest *penalty* imposed under Section 45 of respondent's Act.

The Referee in Bankruptcy in his certificate (R. 22-23) commented upon the careful discrimination in the use of the words found in the opinion of the Attorney General. The respondent has had the section of the Act upon which it relies in its attempt to cause your petitioner in this proceeding to pay a penalty for delinquent contributions construed by the Attorney General and his opinion is entitled to great respect and consideration. While not of controlling authority, it might be considered as having quasi-judicial effect and force. Your petitioner supports this contention

by citing *People v. Shearer*, 30 Cal. 645, and *Hutchins v. Merced Co.*, 140 Cal. App. 348, and the following excerpt from Volume 3 California Jurisprudence, page 569, reading:

> "It may be noted that the opinions of the Attorney General are not of controlling authority, yet in view of his relation to the general government, and the nature of his duties, they are regarded as having a quasi-judicial character, and entitled to great respect."

Your petitioner submits that the opinion of the Attorney General clearly supports the decision of the Referee in Bankruptcy which was affirmed by the District Court. Section 45 of the Unemployment Reserves Act causes the delinquent employer to become *additionally* liable for payment of 12% per annum interest and the Attorney General clearly states that the respondent has no discretion to waive the collection of this interest *penalty* and must make every effort to collect the same. Although designated as interest, it is simply a penalty which cannot be allowed under Section 57-j of the Bankruptcy Act.

CONCLUSION.

The label placed upon an imposition in a statute is not decisive in determining its character. Although called interest, it may in fact constitute a penalty, and, if so, the Court should not shut its eyes to the fact but should give it the same legal effect as a penalty described as such.

Your petitioner respectfully submits that the Circuit Court of Appeals erred in relying upon the decision of this Court in the *Childs* case. The factual difference in the pending matter and in the *Childs* case is evident, due to the fact that this Court, in its decision in the *Childs* case, found that the *Federal Statute* being construed was precise and that there was necessity for uniformity of construction of a Federal Statute in all of the states. The Circuit Court erred in failing to follow the decision of this Court in the *Jersawit* case wherein a factual similarity is found. In that case this Court had occasion to construe a *State Statute* and a State *Statute* is also submitted for construction in the pending matter. Under these circumstances, the *Jersawit* case is clearly in point.

Upon the foregoing considerations and authorities, the decision of the Circuit Court should be reversed.

Dated, San Francisco, California,
November 17, 1941.

Respectfully submitted,
W. RANDOLPH MONTGOMERY,
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Counsel for Petitioner.

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GRANT H. WREN,
JAMES M. CONNERS,
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